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IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PEGGY KERNS, FORMER MEMBER OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF COLORADO, AND TEXAS DOMESTIC VIOLENCE DIRECT SERVICE PROVIDERS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Other Authorities

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COLORADO COALITION AGAINST DOMESTIC VIOLENCE, *Press Release: Program Shelters Continue to Reach Maximum Capacity Despite Community Support* (Apr. 12, 2004) 13, 14

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Melody Fuller & Janet Stansberry, "1984 Legislature Strengthens Domestic Violence Protective Orders," 23 COLO. LAW. 2327 (1994) 7

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Wendy Max et al., *The Economic Toll of Intimate Partner Violence Against Women in the United States*, 19 VIOLENCE & VICTIMS 265 (June 2004) 13, 14

Ted R. Miller et al., *Victim Costs and Consequences: A New Look*, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE No. 155282 (1996) 14

Connie Platt, *Domestic Violence: Impact on the Workplace*, NCADV VOICE (Summer 1993) 13

Elizabeth Topliffe, Note: *Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039 (1992) 19, 21

Deborah M. Weissman, *Gender-Based Violence as Judicial Anomoly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081 (September 2001). 21

Joan Zorza, *Women Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421 (1991) 13

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INTERESTS OF THE *AMICI CURIAE*[1]

Peggy Kerns is the director of the National Conference of State Legislators Center for Ethics in Government in Denver, Colorado. From 1989 to 1997, Ms. Kerns served in the Colorado House of Representatives, and in 1994, she served as the House minority leader. During her tenure as a Colorado legislator, Ms. Kerns had particular interest in criminal justice and social services issues and received a number of "best legislator" awards for her work in those areas. Ms. Kerns was the sponsor of House Bill 1253, which became the Colorado statute at issue in this case.

Texas RioGrande Legal Aid, Inc. ("TRLA"), a non-profit law firm that provides legal services to indigent residents in 68 counties of Southwest Texas, represents 19 domestic violence shelter organizations in its Texas service area. The Amistad Family Violence and Rape Crisis Center, Atascosa Family Crisis Center, Inc., Crisis Center of Comal County, Friendship of Women, Inc., Guadalupe Valley Family Violence Shelter, Highland Lakes Family Crisis Center, Hill Country Crisis Council, Family Crisis Center of Bastrop, Family Crisis Center of Harlingen, Family Crisis Center of the Big Bend, Family Violence Prevention Services, Inc. (San Antonio), Hays-Caldwell Women's Center, Winter Garden Women's Shelter, Inc., Mujeres Unidas, Southwest Family Life Center, Williamson County Crisis Center, SafePlace of Austin, the El Paso Center Against Family Violence, and Mid-Coast Family Services

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[1] Pursuant to Rule 37.6, *amici curiae* disclose that no counsel for any party in this case authorized this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. Letters of consent for filing this brief are on file with the clerk.

are private, non-profit organizations that serve victims of domestic violence and sexual assault with safe shelter, counseling, and financial and legal advocacy.

TRLA and the Texas family violence shelters assist clients with obtaining criminally enforceable civil protective orders akin to the Colorado protection orders at issue in this case.[2] The Texas enforcement statute parallels Colorado's in that it mandates peace officers to make arrests for protection order violations under certain circumstances. As direct service providers, *amici* are keenly aware of the dangers of inconsistent law enforcement response to protection orders: clients become discouraged from reporting violations and the violations recur and escalate, sometimes with tragic consequences. A decision to reverse the Court of Appeals would adversely impact victims of domestic violence by rendering illusory the protection promised to them by the legislature and the courts.

SUMMARY OF ARGUMENT

This is a case about a state legislature's policy choice to create an entitlement to mandatory police enforcement of protection orders for victims of domestic violence, and a woman's right to due process for the deprivation of her entitlement. The first inquiry of this Court is whether Jessica Gonzales had a protected property interest. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court identified

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[2] In 2003, the Colorado legislature nonsubstantively amended its domestic restraining order statute to use the term "protection order," clarifying that "protection orders" include any restraining order issued prior to 2003. *See* Colo. Rev. Stat. § 18-6-803.5(1.5)(a.5)(I) (2004). This brief will use the term "protection order" when referring to the order obtained by Jessica Gonzales.

the defining characteristics of constitutionally protected property interests: a benefit, defined by state rules or law, given to a person and on which the person may reasonably rely. *Id.* at 577. The Tenth Circuit decision correctly applied *Roth* in determining that under the Colorado statutory scheme, Jessica Gonzales became entitled to police enforcement of her protection order when the state court judge issued its order for her protection. 366 F.3d 1093, 1103 (10th Cir. App. 2004) (*en banc*). In doing so, the Court of Appeals gave proper deference to Colorado's separation of powers doctrine. Colo. Const. art. III. More than a rhetorical nicety, the state's separation of powers doctrine is intended to prevent exactly what occurred in this case: the arbitrary and dangerous exercise of power by one branch of government, usurping the power of another branch.

Pursuant to its constitutional authority, the Colorado legislature enacted a statute that provided substantive limitations on the discretion of police to enforce protection orders. Colo. Rev. Stat. § 18-6-803.5. Specifically tailored to resolve the problem of inconsistent police response to protection order calls, the statute reflects a policy choice that the reduction of family violence through consistent enforcement of protection orders is a high priority to the people of Colorado. *See id.* § 13-4-102(1). The language of the statute plainly states that police shall arrest or seek an arrest warrant when they find probable cause of a violation of a protection order. *Id.* § 18-6-803.5(3)(b). The structure and history of the statute evince the intent of the legislature to ensure that police consistently enforce protection orders issued by Colorado courts.

Once a trial court heard evidence and made a specific finding that Jessica Gonzales's husband was likely to harm

his wife and children, the court issued a protection order. At that point, Ms. Gonzales became entitled to mandatory police enforcement of her order. By refusing to enforce the order obtained by Jessica Gonzales, the Castle Rock police exceeded their statutory authority.

Reversing the court of appeals would upset Colorado's separation of powers in three ways: by endorsing police abdication of their duty to faithfully execute the laws; by ignoring the studied policy choices of the legislature; and by rejecting the particularized findings of a trial court. The policy choice to limit police discretion reflects the General Assembly's understanding of the unique dynamics of power and control in domestic disputes and the danger posed to victims by the escalating incidents of violence perpetrated by their batterers. As the facts of this case demonstrate, the determination that mandatory enforcement is necessary is one that is dangerous to permit police to second-guess. Unless peace officers are held accountable for refusing to follow the mandate of the legislature and the express order of the court, protection orders are meaningless. Respondents will be free to violate them in ways that seem harmless to a peace officer unfamiliar with the facts that led to the issuance of the order, and the danger to the victims of family violence will exponentially increase. While there may be exposure to liability in some cases for municipalities and agencies, such costs can be avoided by adopting policies of consistent enforcement in conformity with the General Assembly's mandate. Moreover, the costs of violating the Constitution should not be shifted to victims of domestic violence and to the taxpayers who shoulder the societal costs of domestic violence.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY RECOGNIZED THAT COLORADO LAW CREATES A PROTECTED PROPERTY INTEREST IN MANDATORY POLICE ENFORCEMENT OF PROTECTION ORDERS.

Board of Regents v. Roth, 408 U.S. 564 (1972), recognizes that due process protections apply to property interests that are "legitimate claim[s] of entitlement," the purpose being to protect "those claims upon which people rely in their daily lives." *Id.* at 577. The Court observed that property interests are created and their dimensions "defined by existing rules or understandings that stem from an independent source *such as state law*." *Id.* (emphasis added). Applying these guidelines and relevant precedent in what it recognized was a novel context, the Tenth Circuit Court of Appeals analyzed the Colorado protection order and the statute that authorized it and held that, together, they created a benefit in mandatory police enforcement to which Jessica Gonzales had a legitimate claim of entitlement. 366 F.3d 1093, 1100-01 (10th Ct. App. 2004) (*en banc*).

The Tenth Circuit's opinion underscores the authority of the Colorado legislative body – the General Assembly – to enact statutes that limit executive discretion pursuant to the state's constitutional separation of powers doctrine. *See* Colo. Const. art. III.[3] A foundational doctrine of both the federal and Colorado government, the separation of powers

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[3] "The powers of the government of this state are divided into three distinct departments – the legislative, executive, and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Colo. Const. art. III.

doctrine prevents the encroachment of any one branch of government upon the power of another. *See Miller v. French*, 530 U.S. 327, 341 (2000); *People v. Barth*, 981 P.2d 1102, 1105 (Colo. App. 1999). Because the doctrine is not binding on the states by the federal government, it is necessary to look to Colorado law to determine whether the state applies its doctrine rigidly, or permits overlap of powers with respect to some matters. *See Dreyer v. Illinois*, 187 U.S. 71, 84 (1902); *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 536 P.2d 308, 316-17 (Colo. 1975).

Recognizing the General Assembly's critical role as the policy-making branch of government for the state, the Colorado Supreme Court has frequently acknowledged the General Assembly's power to curtail judicial and executive discretion to further public policy of the state. *See, e.g., People v. Newman,* 91 P.3d 369, 372 (Colo. 2004) (power to limit court's sentencing discretion); *Colo. Office of Consumer Counsel v. PUC*, 42 P.3d 23, 26 (Colo. 2002) (power to limit public utilities rate-making authority); *In re 2000-2001 Dist. Grand Jury in & for the First Judicial Dist.*, 22 P.3d 922, 926 (Colo. 2001) (power to limit court's authority to release a grand jury report); *People v. Bagby*, 734 P.2d 1059, 1061-62 (Colo. 1987) (power to limit prosecutorial discretion on what charges may be filed for violation of a specific statute). Accordingly, although the executive branch traditionally maintains discretion in enforcement decisions, *see People v. Gallegos,* 644 P.2d 920, 930-31 (Colo. 1982), the General Assembly is fully empowered to limit that discretion when public policy concerns dictate.

A. THE COLORADO LEGISLATURE MADE A CONSCIOUS CHOICE OF POLICY TO REQUIRE MANDATORY ENFORCEMENT WHEN PROTECTION ORDERS ARE ISSUED.

In 1994, the Colorado General Assembly tackled the problem of domestic violence through legislative reform. *See generally*, Melody Fuller & Janet Stansberry, "1994 Legislature Strengthens Domestic Violence Protective Orders," 23 COLO. LAW. 2327 (1994). The Assembly considered and passed HB 1253, the legislation that became Colo. Rev. Stat. § 18-6-803.5, by instituting a mandatory arrest policy for the violators of domestic violence protection orders. Colo. Rev. Stat. § 18-6-803.5(3)(b). Mandatory arrest was just one provision in an omnibus bill intended to strengthen the protections and remedies available to domestic violence victims. The bill included a finding of the necessity of a consistent statewide law enforcement response to domestic violence, *id.* § 13-14-102(1), and toughened civil and criminal penalties to hold the perpetrators of family violence accountable for their actions and deter them from committing future acts of violence. *Id.* §§ 16-4-103(2); 18-6-803.5(2)(a); 18-6-803.5(2)(a.5); 18-1-1001(5).

1. The plain language of the statute requires mandatory enforcement.

Petitioner and its *amici* argue that Colorado did not create an entitlement to mandatory enforcement, because the mandate to law enforcement in the statute is "conditional" or "discretionary." Petitioner's Brief, at 26; Brief of the United States of America, at 15. This distorted reading of the statute ignores the plain language of section 18-6-803.5, which expressly states in mandatory terms the obligations of police

officers when responding to protection order violation calls. The statute begins with the broad mandate to law enforcement that "[a] peace officer *shall* use every reasonable means to enforce a protection order." Colo. Rev. Stat. § 18-6-803.5(3)(a) (emphasis added). The statute goes on to specify exactly what minimum enforcement is required, and how it must proceed. Initially, a peace officer must determine whether probable cause exists to believe that (1) a valid protection order has been violated, and (2) the restrained person had notice of the order. *Id.* § 18-6-803.5(3)(b). The statute limits the peace officer's discretion in making a probable cause determination, by requiring her to assume that all information provided by the crime information registry is accurate, and by requiring her to accept a protection order as valid even if it does not appear in the registry. *Id.* § 18-6-803.5(3)(c).

Upon finding probable cause to believe that a valid protection order has been violated and that the restrained person had notice of the order, the statute mandates that "[a] peace officer shall arrest," or, if an arrest would be impractical, "seek a warrant for the arrest" of the offender. *Id.* § 18-6-803.5(3)(b). Despite the efforts of the Petitioner to torture any recognizable, plain, common-sense meaning out of the word "shall," the statute is plainly worded and both the English language and the context indicate that "shall" is intended to be a mandate. The statute uses "shall" when referring to actions that must take place (arrest, or seeking an arrest warrant), and uses "may" when referring to actions that are within the discretion of the peace officer (arrest without notice, transportation of the victim to a shelter). *Id.* § 18-6-803.5(6)(a).

Petitioner argues that the statute provides options for enforcement because it authorizes other "reasonable means" of enforcing the order. Petitioner's Brief, at 29. However, the statute's complementary enforcement options should not be read to undermine the mandatory enforcement provisions. The peace officer is obligated to arrest unless impractical; e.g., when the person who violated the order is not to be found at the scene. In that case, the General Assembly requires the peace officer to seek an arrest warrant. The provision that the officer "shall use every reasonable means" simply empowers law enforcement to use supplemental means to enforce the order. Colo. Rev. Stat. § 18-803.5(3)(a). There is no logical reading of the statute that authorizes peace officers to do *nothing*, which is exactly what Ms. Gonzales alleges the Castle Rock police did in this case.

2. The context of the statute reveals an overall purpose of toughening enforcement measures.

The rest of the statute signals the General Assembly's intent to require vigorous enforcement of the protection orders. In the same section that dictates that peace officers "shall" enforce protection orders, the General Assembly shields peace officers from liability stemming from erroneous arrests made in the course of enforcing protection orders. Colo. Rev. Stat. § 18-6-803.5(5). The exemption of liability for peace officers under those circumstances reveals that the General Assembly, as a policy choice, preferred the risk of erroneous arrest to the risk presented by permitting the police discretion not to arrest. These policy choices by the General Assembly clearly reflect the stated intent that the enforcement of protection orders are of paramount importance.

Moreover, the statute creates enhanced criminal penalties for domestic violence offenders. Colo. Rev. Stat. §§ 16-4-103(2); 18-1-1001(5). In fact, the General Assembly enhanced the penalties for subsequent violations of protection orders. *Id.* § 18-6-803.5(2)(a). In recognition of the unique danger that domestic violence offenders pose to their victims, the General Assembly designated a second violation of a protection order a crime of "extraordinary risk," subject to a higher sentencing range. *Id.* § 18-6-803.5(2)(a.5). The toughening of criminal penalties mirrors the toughening of enforcement mechanisms.

Significantly, the General Assembly codified its finding that uniform procedures were a necessary response to the dangers posed by unchecked domestic violence: "The general assembly hereby finds that *the issuance and enforcement of protection orders are of paramount importance* in the state of Colorado because protection orders promote safety, reduce violence, and prevent serious harm and death." Colo. Rev. Stat. § 13-14-102(1) (emphasis added). Further, the sponsor of the bill in the House of Representatives spoke of the need for consistent action by the criminal justice system to fight domestic violence: "[T]he entire criminal justice system must act in a consistent manner, *which does not now occur*. The police *must* make probable cause arrests." *Hearing on H.B. 1253 Before the House Judiciary Comm.*, 1994 Leg. (Colo. 1994) (statement of Rep. Kerns, sponsor) (emphasis added).

Petitioner through its *amicus* argues that Colorado law did not create a property interest based on the traditional understanding that executive enforcement decisions involving third parties are not subject to review. Brief for the United States of America, at 17-18. But the traditional

presumption that executive discretion *not* to take an enforcement action is unreviewable is "only a presumption, not a categorical rule." *Baltimore Gas and Electric Co. v. Federal Energy Regulatory Commission,* 252 F.3d 456, 460 (Ct. App. D.C. 2001). In *Heckler v. Chaney*, the Court recognized that the presumption may be overcome where a substantive statute – as there is in this case -- provides guidelines for the agency to follow in its enforcement powers. 470 U.S. 821, 832-33 & n. 4 (1985).[4]

Petitioner argues that the statute must be read in the context of the normal discretion afforded law enforcement officers in enforcement matters. Brief of Petitioner, at 30. We agree: the plain language and history of the statute demonstrate that the General Assembly recognized traditional police discretion and specifically rejected its applicability to protection order violations. Far from undermining the mandatory nature of this statute, the fact that Colorado law traditionally affords local police discretion in enforcement reinforces the conclusion that the General Assembly purposefully delimited that discretion for protection order enforcement. The protection order statute begins with the codified finding that protection order enforcement is a matter of "paramount importance in the state of Colorado." Colo. Rev. Stat. § 13-14-102(1). Deference must be afforded to statements by the General Assembly that a public policy matter is of state-wide

[4] In *Chaney*, the Court also recognized that an enforcement decision may be reviewed in cases where it could be found that the agency "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n. 4 (citing *Adams v. Richardson*, 156 U.S. App. D.C. 267 (1973) (en banc)). This case arguably implicates this exception as well, given that Ms. Gonzales alleged in her complaint that the Town of Castle Rock maintained a policy of failing to respond to complaints of domestic restraining order violations and tolerated the non-enforcement of such orders.

concern. *See National Advertising Co. v. Dep't of Highways*, 751 P.2d 632, 635 (Colo. 1988).[5]

3. *Mandatory enforcement reflects the legislature's policy choice that the costs of domestic violence outweigh the burden of mandatory enforcement.*

While limiting police discretion may appear to be a drastic remedy, in fact, for states, the costs of not confronting domestic violence in a forceful manner far outweigh the costs of potential liability for failure to enforce protection orders. The data show that strong enforcement of measures meant to prevent family violence saves society substantial costs. *See* Kathryn Anderson Clark et al., *A Cost-Benefit Analysis of the Violence Against Women Act*, 8 VIOLENCE AGAINST WOMEN 417, 418 (2002) (finding that the prevention and enforcement measures of the Violence Against Women Act of 1994 have reduced the societal costs associated with violent criminal victimization of women).

The economic toll of domestic violence is devastating to society because its impact hits on a number of levels, including medical and mental health care, social services, the workplace, and the criminal justice system. In the employment sector, victims of domestic violence lose a total of nearly eight million days of paid work annually, the

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[5] *Amicus* United States of America argues that the existence of other statutes which provide for mandatory suppression of riots and mandatory arrest of fugitives prove that Colorado did not intend an inflexible duty to arrest. Brief of the United States of America, at 16. But those statutes differ in this important respect: their enforcement provisions are not triggered by specific orders issued on behalf of a specific person and to a specific person. Thus, even if the statutes use mandatory language, it does not follow that they create a protected property interest.

equivalent of 32,114 full-time jobs each year. *Costs of Intimate Partner Violence Against Women in the United States*, DEP'T OF HEALTH AND HUMAN SERVS., CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) -- NAT'L CTR. FOR INJURY PREVENTION & CONTROL, 19 (March 2003). Employers in this country spend at least $3 billion each year in lost work time, increased health care costs, higher turnover, and lower productivity due to domestic violence. Connie Platt, *Domestic Violence: Impact on the Workplace*, NCADV VOICE, Summer 1993, at 16. In the health-care sector, the estimated annual cost of health care due to domestic violence in this country is $4.1 billion. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *supra* at 30. More than 1,400,000 visits to American emergency rooms per year result from domestic violence. Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 383 (1994). These costs are significant not only for individual victims, but for the public as a whole. An analysis of the costs of medical care associated with domestic violence physical assaults found that Medicare and Medicaid shouldered 20% of those costs. Wendy Max, et al., *The Economic Toll of Intimate Partner Violence Against Women in the United States*, 19 VIOLENCE & VICTIMS 265, 266 (June 2004). In the housing sector, an estimated 50% of all homeless women and children in the United States are fleeing domestic violence, resulting in millions of dollars spent by states to maintain shelters. Joan Zorza, *Women Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 421 (1991). In Colorado alone, domestic violence advocacy programs provided 101,517 nights of shelter, while still having to turn away more than 10,000 women and children. COLORADO COALITION AGAINST DOMESTIC VIOLENCE, *Press Release:*

Program Shelters Continue to Reach Maximum Capacity Despite Community Support (Apr. 12, 2004).

All told, the estimated cost of medical care, mental health services, and lost productivity from injury and premature death due to domestic violence against adult women totaled more than $8.3 billion in the United States in 2003. Max, et al., *supra* at 259. This figure does not include lost quality of life valuations or the costs states must pay to maintain shelters, the criminal justice system, and services for children in homes where domestic violence takes place (including foster care and counseling programs). A study that included expenses resulting from lost quality of life estimated the total costs of domestic violence in the United States to be $67 billion in 1993. Ted R. Miller, et al., *Victim Costs and Consequences: A New Look* (U.S. Dep't of Justice, Nat'l Inst. of Justice No. 155282, 1996).

The staggering economic, societal, and human cost of domestic violence was part of the impetus that led the Colorado General Assembly to find that effectively combating domestic violence is of paramount importance. These policy decisions are the appropriate province for the legislative branch, which has the resources and the constitutional authority to hold hearings and conduct investigations for the purpose of determining the best legislative policy for the State of Colorado. The General Assembly concluded that mandatory enforcement of protection orders was necessary to reduce domestic violence; the Assembly therefore made the mandatory enforcement of protection orders a public policy priority. In doing so, the Colorado legislature created a benefit to which domestic violence victims who receive protection orders have a legitimate claim of entitlement.

B. THE COLORADO LEGISLATURE GAVE THE JUDICIARY EXCLUSIVE DISCRETION TO DETERMINE WHETHER A PERSON IS ENTITLED TO A PROTECTION ORDER.

The Tenth Circuit concluded that the property interest in this case "derives from the existence of a restraining order issued by a court on behalf of a particular person and directed at specific individuals and police." 366 F.3d at 1104, n. 9. In other words, there is no entitlement to mandatory police enforcement until a court issues a protection order pursuant to this statute. Thus, a protected property interest arises here, where it does not in the context of other statutes that provide for mandatory enforcement, because there is a specific order issued on behalf of a specific person.

The Colorado legislature placed all of the discretion to determine whether a person is entitled to mandatory enforcement of a protection order in the judiciary. This grant of discretion is appropriate. Of the three branches of government, only the judiciary is uniquely situated to determine whether there is the likelihood of future violence such that a protection order is warranted in a specific case.

As a general rule, trial courts are in the business of evaluating the credibility of witnesses and the weight and force of evidence. *See People v. Gaskins*, 825 P.2d 30, 38 (Colo. 1992) (observing that factual inquiries are appropriate for trial courts and not reviewing courts). Unlike peace officers, who must often make split-second decisions based on whatever limited, unverified and often unverifiable information they have when they appear on a scene, courts have the opportunity to develop a record through an adversarial system that gives full notice to be heard to both

parties. *See* Colo. Rev. Stat. § 13-14-102(9) (providing that the judge's determination of case shall occur after the citation to defendant is returned and a hearing has been had). Furthermore, courts have the benefit of a system of rules of evidence and civil procedure designed to ensure that only reliable evidence is evaluated when making findings. *See* Colo. R. Evid. 102 (stating that the rules of evidence should be construed to ensure that "the truth may be ascertained and proceedings justly determined"); *People v. Fuller*, 788 P.2d 741, 746 (Colo. 1990) (assessing the admission of evidence as meeting the purpose of the rules of evidence because it was reliable and would lead to a finding of the truth). Additionally, courts are deemed to be neutral arbiters of evidence, safeguarding the rights of both the applicant and respondent and insuring that the determination of whether a protection order is needed will not be made in a partisan or arbitrary matter. *Cf. United States v. Watson*, 423 U.S. 411, 447-48 & n.12 (1976) (explaining the purpose of the warrant requirement in the Fourth Amendment to the United States Constitution).

Under the Colorado legislative scheme, the benefit of mandatory police enforcement only becomes a protected property interest when a court makes two essential findings: (1) that the defendant committed acts giving grounds for issuing the order; and (2) that there is a likelihood that the defendant will commit such acts in the future unless restrained. Col. Rev. Stat. § 13-14-102(9)(a). Once a court makes those two critical findings, the legislature requires the court to order a permanent protection order benefiting the victim. Thus, when a court has made these findings, the court's discretion ends. The court is obligated to issue the order upon making the above findings. *Id.* A protection order properly issued pursuant to section 13-14-102(9)

carries with it the promise and benefit of mandatory enforcement. *Id.* § 18-6-803.5(3).

A beneficiary of a protection order is entitled to rely on the promise of mandatory enforcement not simply because there is a statute, but because of the court's individualized fact-finding process which concluded that the statute must be applied in her case. Only at that point does the potential benefit of the statute become actualized; the court makes the requisite findings and further admonishes the batterer as to the mandatory arrest provisions in the law. *Id.* The beneficiary of the order leaves the courtroom with the protection order and the promise that the state will enforce this order -- a legitimate claim of entitlement to a government benefit that she relies on in her daily life.

In this case, the trial court reviewed the evidence in an adversarial hearing at which Mr. Gonzales had an opportunity to be heard. The court found that physical or emotional harm would result if Mr. Gonzales were not excluded from the home, ordered to stay at least 100 yards away from the property at all times, and restricted in his access to the children. *See* 366 F.3d at 1103. The court incorporated the mandatory enforcement provisions of the enabling statute, instructing the police regarding their mandatory duty to enforce the order, and thus creating a claim of entitlement to mandatory enforcement that Jessica Gonzales believed she could rely on. *See Roth, 408 U.S. at 577.*

II. ELEVATING THE AUTHORITY OF THE EXECUTIVE BRANCH TO OVERRULE DECISIONS MADE BY THE LEGISLATURE AND THE JUDICIARY WOULD WREAK HAVOC ON COLORADO'S SEPARATION OF POWERS DOCTRINE.

A decision to reverse the Tenth Circuit by refusing to recognize Jessica Gonzales's property right would upset the separation of powers in Colorado in three ways: (1) by sanctioning the executive branch's abdication of duty; (2) by ignoring the policy choices made by the Colorado legislature; and; (3) by rejecting the fact-findings made by the Colorado trial court.

Police refusal to enforce mandatory arrest laws violates the constitutional duty of the executive branch to faithfully execute the laws. *See Colorado v. Pena*, 911 P.2d 48, 55 (Colo. 1996); *see also* Colo. Const. art IV § 2. When the executive acts contrary to the legislature's express wishes, it is not a minor matter. As this Court stated in a seminal case involving the power of the executive branch: "It is to disrespect the whole legislative process and the constitutional division of authority between the [executive] and [legislature]." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, Jr., concurring); *see also id.* at 637 (Jackson, J. concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ")

Furthermore, when the police choose not to enforce mandatory arrest laws, they encroach upon the exclusive province of the legislative branch to make public policy for the state. Petitioner's *amicus* argues that police should have

the discretion to not arrest in the cases of non-violent restraining order violations. *See* Brief for the United States of America, at 25. But this assertion endorses the proposition that police should substitute their own policy judgments for those of the legislature, dismissing the fact that the General Assembly enacted the statute based on a studied understanding of the dynamics of domestic violence. When family violence has occurred, it is likely to recur and to escalate. The value of a protection order is that it potentially prevents violence *before* it can occur. If a peace officer refuses to arrest or to seek a warrant because he does not believe that the batterer is causing harm, a harm has occurred: the batterer has violated the protection order without consequence and may be emboldened to do so again. *See* Elizabeth Topliffe, Note: *Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not,* 67 IND. L.J. 1039, 1046-47 (1992).

Moreover, peace officers are likely to misperceive the severity of a domestic abuse situation, as is tragically illustrated by this case. The *amicus* for Petitioner argue that being forced to enforce protection orders would require them to prioritize protection order violation calls over more severe and dangerous calls. *See* Brief for the United States of America, at 25. But a critical difference between protection order violation calls and other criminal situations is that the severity and dangerousness of the situation has already been adjudicated and resulted in the issuance of the protection order; the fact that the protection order is being violated is an indication of the batterer's dangerousness and disregard for the law. Thus, when a court has found a likelihood of future harm and issued a protection order pursuant to the statute,

peace officers should not be permitted to substitute their own assessments.

Federal respect for Colorado's choice as to how to regulate the complicated area of family violence means respecting the decision of the General Assembly to delimit police discretion and require mandatory enforcement. Petitioner suggests that federal deference to the enforcement regime means further respecting the fact that Colorado provides only a very limited tort remedy against police officers who fail to comply with mandatory enforcement. Petitioner's Brief, at 33. But this Court has long stated that due process remedies are not a "font of tort law." *Paul v. Davis*, 424 U.S. 693, 701 (1976); *see also Daniels v. Williams*, 474 U.S. 327, 333 (1986) ("It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.") Thus, recognizing a due process remedy in no way insults a state's authority in its decision whether to provide a tort law remedy. The two concepts are distinct. A due process right does not arise because a state creates a tort remedy; rather, a remedy for a violation of due process is necessary when a government creates an entitlement that requires due process protection

III. THE CONSEQUENCES OF THE BREAKDOWN OF THE SEPARATION OF POWERS IN COLORADO ARE THE DANGERS THAT INSPIRED THE MANDATORY ENFORCEMENT STATUTE.

"The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in

even the most disinterested assertion of authority." *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring). The executive branch's choice to second-guess the policy choice of the legislature and the adjudication of the judiciary is a dangerous one. Left unchecked by the imposition of liability for its actions, the Castle Rock police may continue to exercise unauthorized discretion in determining whether to make arrests for violations of protection orders. This case illustrates the most tragic result of what can happen where peace officers make their own decision whether arrest is warranted and whether the protected persons face any "real" danger from the domestic violence perpetrator. But the impact is farther-reaching than the murder of the Gonzales children.

As the General Assembly found, protection orders can be an effective means of minimizing future family violence. In that they can stop violence from recurring in the future, protection orders are invaluable in encouraging victims to break out of the cycle of violence. Victims may be more willing to get a protection order than to press criminal charges, so as not to lose the source of financial support for their family. *See Topliffe* supra, at 1048. Because they are civil proceedings, there is a lower burden of proof to obtain a protection order than a criminal conviction, which is critical in these cases where often the sole witnesses to the crime are the victim and batterer. *Id.* Perhaps more importantly, obtaining a protection order empowers a victim to take a stand against her batterer, disrupting the dynamics of power and control the batterer has over the victim that is typical of abusive relationships. *See* Deborah M. Weissman, *Gender-Based Violence as Judicial Anomoly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1138 & n.317 (September 2001).

In arguing that the Court of Appeals opinion should be reversed, the Petitioner's *amici* present a parade of horribles that they claim would result from recognition of Ms. Gonzales's constitutional claim: liability imposed for minor violations of state law, local government bodies falling into economic collapse from lawsuits. In reality, timely enforcement prevents many of the costs local governments face when domestic violence victims are not protected, especially the investigation and prosecution of homicides and sexual assaults. Further, the concern about liability creates an appropriate incentive for law enforcement agencies and municipalities to adopt policies of consistent and mandatory enforcement in accordance with the law. These minimum enforcement requirements do not pose an unreasonable burden on municipalities. The enforcement mechanisms that are mandated do not call for mandatory general police protection for all victims. They simply call for the arrest of the violator of a protection order, or that the police seek an arrest warrant for the offender. Because mandatory arrest is a policy choice of the legislature, it is the responsibility of the General Assembly -- the branch of government in the best position to assess public policy in the context of state's priorities, needs, and resources -- to change the law if it is not feasible or desirable.

IV. CONCLUSION

In Colorado, the separation of powers doctrine enables the General Assembly to limit executive discretion to further public policy. The plain language, history, and structure of the statute establish that the General Assembly intended for police to prioritize domestic violence cases on the highest level. When the judiciary made its particularized

findings in the Gonzales case, Jessica Gonzales became entitled to mandatory police protection. Recognizing the property interest in this case accords proper respect to the separation of powers in Colorado. If the demands of the statute are impossible as Petitioner claims, the police agencies have the mechanisms of the democratic process to revisit the policy decisions made by the General Assembly. The solution is not for them to substitute their judgment for the determinations already made by the legislature and the courts. Nor is the solution to pass the costs of violating the Constitution upon the individual whose rights were violated. The Court of Appeals en banc decision should be affirmed.

Respectfully submitted,

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